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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RENO LERETTE,

Defendant and Appellant.

F043902

(Super. Ct. No. RF004109A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice, Judge.

Linda J. Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Buckley, Acting P.J., Cornell, J., and Dawson, J.

## INTRODUCTION

Appellant, Reno Lerette, was charged in an information with residential burglary (Pen. Code, §§ 459 & 460, subd. (a), count one) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count two). After a jury trial, Lerette was convicted of count one and acquitted of count two.

The probation officer's report stated there were no unusual facts indicating probation could be granted if otherwise appropriate. The report set forth four aggravating factors: (1) Lerette had numerous prior convictions; (2) Lerette served three prior prison terms in Arizona; (3) Lerette was on probation at the time of the instant offense; and (4) Lerette's prior performances on probation and parole were unsatisfactory. The probation officer found there were no mitigating factors and recommended the six-year upper term.<sup>1</sup>

The trial court found each of the aggravating factors true, including the fact that Lerette served three prior prison terms in Arizona. The court found that the aggravating factors outweighed the non-existent mitigating circumstances. The court imposed the upper term of six years, granted applicable custody credits, and imposed a restitution fine.

Lerette contends on appeal that the trial court violated his rights as set forth in *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531], and *Apprendi v. New Jersey* (2000) 530 U.S. 466. We will find that the trial court did not violate Lerette's constitutional rights in imposing the upper term for his conviction because one of the factors used by the trial court to impose the upper term was the fact of Lerette's prior felony convictions.

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<sup>1</sup> Lerette had entered an enclosed patio and had broken a kitchen window leading into the victim's home. Lerette was pushing glass from the broken window to enter the victim's residence when he was confronted by the victim, who threatened to shoot Lerette if he tried to enter her home. Lerette ran away and was later captured by investigating officers. Footprints from the scene matched Lerette's footprint.

## DISCUSSION

*Apprendi v. New Jersey*, *supra*, 530 U.S. 466 held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Blakely* held that “the relevant ‘statutory maximum’ for *Apprendi* purposes is the maximum a judge may impose based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Blakely*, *supra*, at p. \_\_\_\_ [124 S.Ct. 2531, 2537].) Thus, when a sentencing court’s authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts.

The fact of a prior conviction, however, serves as an exception to the holding of *Apprendi*. This exception derives from *Almendarez-Torres v. United States* (1998) 523 U.S. 224 which found that the fact of the prior conviction was based on the defendant’s recidivism, a traditional basis for a court to increase an offender’s sentence. (*Id.* at p. 243.) Recidivism has not been viewed as an element to an offense but relates only to punishment. (*Id.* at p. 244.) The *Apprendi* case recognized that recidivism does not relate to the commission of the new offense. *Apprendi* also recognized that procedural safeguards attach to the fact of the prior conviction and that the defendant there did not challenge the accuracy of the fact of his prior conviction. When this is so, due process and Sixth Amendment concerns are mitigated. (*Apprendi*, *supra*, 530 U.S. at p. 488.)

According to the probation report, Lerette had served three prior prison terms in Arizona. One of these was for attempted kidnapping. Lerette did not object at sentencing to the accuracy of the probation report and did not challenge the fact of his prior convictions.

There were three remaining aggravating factors in the instant action in addition to the fact of Lerette's prior convictions. There were no mitigating factors noted in the probation report. We recognize that the law is not yet settled on whether the remaining aggravating factors fall within the prior conviction exception noted in *Apprendi*. Regardless of whether all of the aggravating factors the court utilized fall within the prior conviction exception, a single valid factor in aggravation is sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433). We therefore find *Blakely* inapplicable, assuming it is otherwise, to the facts of the instant action.

#### **DISPOSITION**

The judgment is affirmed.